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No. 10-315

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR THE PETITIONER

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Respondents do not seriously dispute that the question presented in this case is materially identical to that presented in *AT&T Mobility LLC* v. *Concepcion*, No. 09-893 (to be argued Nov. 9, 2010): *viz.*, whether the Federal Arbitration Act (FAA) preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement. Respondents instead offer two reasons why that question is not properly presented here. Those reasons are entirely illusory, and the decision in *AT&T Mobility* will have a direct and potentially outcome-determinative effect on the resolution of this case. The petition for certiorari should therefore be held pending the Court's disposition of *AT&T Mobility*, and then disposed of accordingly.

1. As explained at greater length in the petition, this case presents a materially identical question to the question presented in *AT&T Mobility*, because the South Carolina Supreme Court held that state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. See Pet. 6-8. That state-law rule, like the one at issue in *AT&T Mobility*, is preempted by the strong federal policy, embodied in the FAA, of "ensur[ing] that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen, S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (internal quotation marks and citation omitted).

Respondents attempt to distinguish this case from *AT&T Mobility* only in a single footnote, in which they argue that the relevant provision of the arbitration agreement here differs from the relevant provision in *AT&T Mobility*. See Br. in Opp. 16 n.5. That contention, however, rests on a blatant misquotation of the arbitration agreement. Far from "prohibit[ing] 'claimant action in court or through arbitration,'" *ibid.*, the relevant provision of the arbitration agreement merely prohibits parties from "bring[ing] or participat[ing] in any class action or *multi*-plaintiff or claimant action in court or through arbitration." S.C. C.A. App. 1100 (emphasis added). It is therefore simply wrong to say, as respondents do, that the provision "would not allow vindication of any claim at all," Br. in Opp. 16 n.5; the provision prohibits only *class* (or other multi-claimant) litigation. And in that respect, the provision is indistinguishable from the provision at issue in *AT&T Mobility*, which provides that "class arbitrations and class actions are not permitted." Pet. App. at 57a, *AT&T Mobility*, *supra*. Because there is no legal or factual basis for distinguishing this

case from *AT&T Mobility*, a hold for *AT&T Mobility* is warranted.[1]

2. Respondents contend (Br. in Opp. 10-14) that the preemption question is not properly presented in this case for two reasons: first, because the preemption argument was not adequately preserved below, and second, because petitioner is in default in proceedings on remand. Both of those reasons are invalid.

a. As noted in the petition, petitioner consistently argued before the lower courts that it would violate the strong federal policy in favor of arbitration to invalidate the prohibition on class arbitration under state law: in other words, that any state-law basis for invalidating that prohibition would be preempted. See Pet. 4. Even before the trial court, petitioner contended that "[t]he FAA embodies the strong federal policy in favor of enforcing arbitration agreements," Mem. in Support of Mot. to Compel Arb. 4 (internal quotation marks and citation omitted), and that "South Carolina courts give due regard . . . to the federal policy favoring arbitration," Reply Mem. in Support of Mot. to Compel Arb. 1 n.1 (internal quotation marks and citation omitted). And in its brief before the South Carolina Supreme Court, petitioner unambiguously contended that the trial court's

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[1] Respondents seemingly contend (Br. in Opp. 16) that, to the extent that they are pursuing claims under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2009), this case does not involve a "true" class action. That is a bewildering contention, because the Dealers Act "expressly provide[s] plaintiffs with the right to bring class action lawsuits"—as the South Carolina Supreme Court noted in holding that "any contract prohibiting a class action suit [for violations of the Dealers Act] violates our State's public policy and is void and unenforceable." Pet. App. 9a, 10a.

holding that the prohibition on class arbitration was unconscionable under state law "violated the federal policy favoring arbitration." Pet. S.C. C.A. Br. 11; see *id.* at 1 (contending, in first question presented, that the trial court "violated the federal and South Carolina policies favoring arbitration").

Respondents do not dispute, moreover, that petitioner raised the preemption argument as its primary argument in its petition for rehearing in the South Carolina Supreme Court. See Pet. for Reh'g 3-7; cf. *id.* at 3 (contending that "[t]he FAA clearly preempts South Carolina law, as this Court construed it"); Return to Pet. for Reh'g 1-2 (responding to preemption argument); Reply in Support of Pet. for Reh'g 3 (renewing contention that "[t]he FAA, as *Stolt-Nielsen* construed it, preempts any South Carolina public policy requiring class arbitration under the Dealers Act").[2] Instead, respondents merely contend (Br. in Opp. 8-9, 12-13) that petitioner's preemption argument was an improper basis for rehearing.

As a preliminary matter, even if petitioner had not raised its preemption argument at earlier stages of the litigation, but see pp. 3-4, *supra*, petitioner would have been thoroughly justified in doing so for the first time in its petition for rehearing. That is true both because the South Carolina Supreme Court had invalidated the prohibition on class arbitration on a novel state-law ground that was neither adopted by the trial court nor advanced

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[2] Respondents contend (Br. in Opp. 9, 12, 13-14) that petitioner somehow forfeited its preemption argument because petitioner did not cite 9 U.S.C. 2 in its petition for rehearing. It was hardly necessary for petitioner to do so, however, in light of its unambiguous assertions that the FAA preempts state law—not least because 9 U.S.C. 2 is only one of numerous provisions in the FAA embodying the federal policy in favor of arbitration. See Pet. 7.

by respondents, see Pet. 4-5, and because petitioner was primarily relying on *Stolt-Nielsen*, a decision of this Court that postdated the South Carolina Supreme Court's decision, see Pet. 5. But in any event, the South Carolina Supreme Court plainly thought that the preemption argument had been properly preserved, because, in denying the petition for rehearing, it rejected that argument on the merits—albeit in dismissive fashion. See Pet. App. 15a (stating that *Stolt-Nielsen* was "distinguishable on the law and the facts"). Because petitioner's preemption argument was both raised and passed upon below, there is no basis for concluding that the argument has been forfeited.

b. Equally meritless is respondents' contention (Br. in Opp. 11) that there is "no justiciable case or controversy" because petitioner is in default in proceedings on remand. As respondents acknowledge, proceedings are ongoing before the trial court, see *id.* at 10—and that is sufficient to ensure that the question presented to this Court is not moot for Article III purposes.

We add only that respondents' account of proceedings below is seriously misleading. As respondents omit to mention, when petitioner appealed the trial court's initial ruling on its motion to compel arbitration, the parties agreed to stay further proceedings in the trial court for the "duration of [the] appeal." Mot. to Stay 1. Out of an abundance of caution, after the South Carolina Supreme Court denied petitioner's petition for rehearing, petitioner filed a motion to continue the stay pending the filing of its petition for certiorari in this Court. See Mot. to Continue in Place the Stay. Although the stay remains in effect (and petitioner's motion remains pending), respondents unexpectedly took the position that petitioner was obligated to file an answer to the complaint—and, on that basis, filed a request for entry of default.

Under South Carolina law, the entry of default is a "ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party," and the validity of the default is subsequently litigated by means of a motion to set aside the default. *Stark Truss Co.* v. *Superior Constr. Corp.*, 602 S.E.2d 99, 102 (S.C. Ct. App. 2004). Critically, "while a clerk may make an *entry* of default, a judge is required to enter a default *judgment*." *Wetzel* v. *Woodside Dev. Ltd. P'ship*, 615 S.E.2d 437, 439 n.2 (S.C. 2005). Consistent with that practice, the clerk of the trial court entered a default and petitioner subsequently filed a motion to set aside the default, which is pending. Under the circumstances, it is exceedingly unlikely that the trial court will deny the motion and enter judgment in respondents' favor.

In any event, the salient fact is that no final judgment has yet been entered. Because there is therefore a live issue whether the underlying dispute between the parties should be resolved in court or in arbitration, this Court has jurisdiction to consider the question presented. And because that question is materially identical to the question presented in *AT&T Mobility*, a hold for *AT&T Mobility* is warranted.

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The petition for a writ of certiorari should be held pending this Court's disposition of *AT&T Mobility LLC* v. *Concepcion*, No. 09-893, and then disposed of accordingly.

Respectfully submitted.

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